BEFORE THE
FEDERAL MARITIME COMMISSION

BALTIC AUTO SHIPPING, INC.	
COMPLAINANT,	
v.	
	DOCKET NO. 14-16
MICHAEL HITRINOV a/k/a MICHAEL KHITRINOV, EMPIRE UNITED LINES CO., INC.,	
RESPONDENTS.	

RESPONDENTS' MEMORANDUM IN REPLY

TO COMPLAINANT'S EXCEPTIONS TO THE

INITIAL DECISION ON RESPONDENTS' MOTION

FOR PARTIAL SUMMARY DECISION

Table of Contents

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Introduction

In this case Baltic Auto Shipping, Inc. (the "Complainant") sought an award of reparations based on Empire United Lines Co., Inc.'s (the "Respondent's") alleged wrongful actions of charging freight rates without having an appropriate tariff on file; failing to issue house bills of lading; wrongfully communicating with the Complainant's customers; and wrongfully delivering cargo to the Complainant's customers after the customers paid the freight charges directly to the Respondent. In addition, Complainant now (2014) complains that Respondent has not issued House Bills of Lading, Freight Invoices and other (unspecified) shipping documentation in the period 2007-2012 when it shipped over 4,000 containerized automobiles using the services of the Respondent. (Amended Complaint, ¶ 12).

Prior to filing the Complaint in this proceeding in 2014 (the "FMC Complaint"), Complainant had made an informal complaint to the Federal Maritime Commission ("FMC" or the "Commission") in November 2011. When that process did not satisfy the Complainant it filed suit against the Respondent in the U.S. District Court for New Jersey (the "DNJ Complaint" or the "DNJ lawsuit") in connection with 167 shipments then *en route* or that had arrived at destination awaiting delivery. The DNJ lawsuit was soon settled, disputed freight charges were

paid by the Complainant and the shipments were delivered to the Complainant or to the Complainant's customers. The shipments that were the subject of both the informal complaint and the DNJ lawsuit are among the shipments involved in the instant proceeding.

The Complainant claims that "it either acted in the capacity of merchant for the various vehicles it owned ... or in the capacity of NVOCC for the vehicles that it was exporting on behalf of its own customers ..." (Complainant's Brief in Support of Its' [*sic*] Exceptions to Initial Decision" ["CB"], p. 16[1]).

In view of the age of the shipments complained of, and the terms of the settlement of the DNJ lawsuit involving some of the same shipments, ALJ Guthridge (the "ALJ") "determined that the effect on this proceeding of the statute of limitations and the effect of the New Jersey settlement releasing claims should be resolved before fully litigating this proceeding" ("Initial Decision" ["ID"], p. 3). Accordingly, Respondent moved for dismissal of this action on the basis of the running of the statute of limitations and/or the settlement terms of the DNJ lawsuit; the Complainant filed a reply, and the Respondent filed a response to the reply. (*Id.*)

The ALJ found "that all of the [Complainant's] shipments at issue and [Respondent's] alleged Shipping Act violations (if any) on these shipments occurred more than three years before [Complainant] filed its FMC Complaint. I also find that [Complainant] had knowledge of

[1] To the same effect: " ... Claimant's rights stemming from its role as an NVOCC with respect to some shipments" (CB, p. 3); " ... [Complainant's] role as owner of some of the cargo, and its role as NVOCC where [Complainant] did not own the cargo and was shipping on behalf of its own clients" (CB, p. 14); " ... although [Complainant] did not hold title to the automobiles within some of the twenty one shipments, [Complainant] was acting as an NVOCC for those shipments ..." (CB, p. 16).

all facts or with due diligence should have known all facts necessary for its claim more than three years before it filed its FMC Complaint. [Complainant's] claim for actual injury resulting from these alleged violations accrued more than three years before it filed its Complaint. Therefore, [Complainant's] claim for a reparation awarded is barred by the Act's statute of limitations" (*Id.*)

The ALJ also found that the Complainant "has not articulated any claim for non-monetary relief that is warranted by the facts of this case. Because without the claim for a reparation award, the FMC Complaint does not set forth a claim for any cognizable relief, the Complaint is dismissed in its entirety" (ID, p. 4).

Finally, the ALJ awarded the Respondent attorneys' fees under the newly enacted Coble Coast Guard and Maritime Transportation Act as he found that "[Respondent] is the prevailing party in this proceeding. Therefore, [Respondent] may be awarded reasonable attorney fees for services performed after the effective date of the Coble Act" (*Id.*, citations omitted).

The Complainant filed twelve enumerated Exceptions to the Initial Decision (attached to the Complainant's Brief as Attachment A); and has attempted to amplify them somewhat in its 48 page brief in support of the Exceptions.

It is the Respondent's positon that the ALJ's comprehensive review of the record, facts and the law warrant the Commission adopting the Initial Decision as the Commission's Final Decision.

Standard of Review

"Where exceptions are filed … the Commission … will have all the powers which it would have in making the initial decision …" 46 CFR 502.227 (a) (6)

In view of the prolix, confusing and redundant documentation and arguments of the instant claim, and the particularity with which the ALJ reviewed, analyzed and commented upon the record, it is not a profitable use of the Commission's time and energy to review the entire record *de novo*.

Suffice it to say, despite the repetitive Exceptions taken by the Complainant, whether the case is dismissed or not depends on the ALJ's findings with respect to three classes of shipments: the so-called Group III, IV and V shipments (as the Complainant concedes that the Group I and II shipments are clearly time-barred[2]).

The ALJ correctly relied on the contemporaneous evidence proffered by the Respondents. The Complainant argues that the ALJ did not give sufficient weight to certain 2015 evidence, created after-the-fact. Taken at face value, the ALJ's exercise of his discretion in such a situation seems to reflect proper regulatory oversight and was not arbitrary or capricious behavior.

[2] "While [Complainant] concedes that the ALJ's rulings regarding Groups I and II are correct …" (CB, p. 9).

Accordingly, the Commission should give deference to the ALJ's thorough, well-reasoned and straight-forward analysis of the facts as presented, as well as the law and regulations applied, and should adopt the Initial Decision as its own.

The Groups of Complainant's shipments

To determine the effect of the statute of limitations and/or the terms of the settlement of the DNJ lawsuit, the Complainant's shipments were divided into five "Groups":

Group I Shipments and Group II Shipments

Group I shipments were "shipments that [Respondent] delivered before [Complainant] filed its 2011 D.N.J. Complaint on November 23, 2011" (ID, p. 10).

Group II shipments were 162 of the 167 shipments at issue in the DNJ lawsuit (ID, p. 11).

Insofar as the claims with respect to Group I and II shipments were related to improper charging of freight rates, the ALJ found that the Complainant knew all it needed to know to file suit more than three years prior to the filing of the FMC Complaint, and therefore the claim for reparations with respect to these shipments are time-barred:

> "As with the Group I shipments, [Respondent] established the original rates [for the Group II shipments] and [Complainant] knew [Respondent's] rates at the time of the shipments, each of which originated more than three years before [Complainant] filed its FMC Complaint. To the extent that the new charges that [Respondent] allegedly imposed

may have violated the Shipping Act, the new charges were imposed on November 14, 2011, and [Complainant] knew of these charges more than three years before [Complainant] filed its FMC Complaint" (ID, pp. 11-12).

In its Brief in support its Exceptions, Complainant admits that the ALJ acted correctly:

"... Baltic concedes that the ALJ's rulings regarding Groups I and II are correct (... with the exception of one shipment ... the 'Batumi' shipment...") (CB, p. 9);

" ... The [Batumi] shipment arguably would have been part of the 'Group II' shipments ...[but for the fact that the nature of the violation was a little different – but not the timing of the alleged offense]... " CB, (fn. 7, p. 10)

Complainant complains that the Respondent violated the Shipping Act when it dealt directly with the consignee of this "Batumi" shipment. After the consignee paid the freight charges the shipment was delivered as required by the settlement terms of the DNJ lawsuit (CB, pp. 32 -33).

While the Complainant seeks to cast the claim for this one shipment as a "'failure to deal in good faith'" with the Complainant, it seems that its real complaint is that Complainant had already paid the Respondent, but "[t]hese funds were never repaid to [Complainant]" (CB, p. 33). Insofar as this is a claim for reparations, the payments by Complainant were made more than three years before the filing of the FMC Complaint and are rightly time-barred – just as all of the other shipments in Groups I and II.

Group III Shipments

The five Group III shipments were part of the 2011 DNJ lawsuit, but not part of the 2011 Settlement as they were settled by parties other than the Complainant (ID, p. 12). The freight charges complained of were known of and occurred more than three years prior to the filing of the FMC Complaint, and thus the claims for reparations were dismissed as time-barred (ID, p. 12).

The other conduct complained of (communications with Complainant's customer[3]) occurred more than three years before the filing of the FMC Complaint, and, indeed was the subject of an informal complaint before the Commission – itself filed more than three years before the filing of the formal FMC Complaint. (CB, fn. 17, pp. 25-26).

Without offering any contemporaneous evidence, Complainant now claims that it was acting as an NVOCC with respect to these five shipments (CB, p. 26). However, the record is clear (from contemporary correspondence) that the freight charges were paid by other parties – to whom the cargoes were delivered (ID, p. 12). Complainant's claim of NVOCC status with respect to these shipments is further undermined by its admissions that it did not learn about the November 2011 payments and delivery until January 2012 (CB, p. 27).

While such (in)-action supports the claim that these were not the Complainant's customers, the Complainant's (in)-action (if believed), are acts of willful ignorance – which do

[3] Assuming, *arguendo*, (as Complainant has made no showing), that such conduct amounted to a violation of the Shipping Act in some way.

not support any tolling of the statute of limitations period. In any event, if the wrongful communications were a Shipping Act violation (which has not been shown), they occurred, and Complainant knew enough to complain to the FMC, more than three years before the filing of the FMC Complaint and are therefore time-barred. Incidentally, the Complainant makes no claim for reparations or other relief, nor even alleges any cognizable injury because of the communications or acceptance of payment from third parties.

Finally, the Complainant has tendered 2015 affidavits from unrelated third parties that discuss these five 2011 shipments that are simply incredible (CB, pp. 27-28). To believe that the affiants can remember these five particular shipments years later was appropriately given little, if any, weight by the ALJ.

The claims for reparations for the allegedly wrongful charges levied, payments made and wrongful communications had for the five Group III shipments were rightfully dismissed as time-barred (ID, p. 12).

Group IV Shipments

These are the 10 "newly identified" shipments (ID, p. 12). They have not been described in any way, except that on some spreadsheet there seem to be 10 more shipments than other

spreadsheets seem to indicate[4]. Complainant alleges that they had been part of another exhibit[5]. In contradiction to its own position, Complainant explains that the booking numbers could not be supplied because there had not been adequate discovery (CB, p. 36).

Complainant has not provided any information about the 10 newly identified shipments – not by booking number, container number, bill of lading number, shipment date, ports of origin or destination – in short, there is no way in which anyone could properly (or effectively) investigate the Complainant's claim (*see* ID, p. 14). What is known is that these alleged shipments would have been booked more than three years before the filing of the Complaint, and therefore any claim for reparations are time-barred.

Complainant tries to identify three of the ten claims using a 2015 affidavit from a third party[6] for whom Complainant claims it was acting as an NVOCC: " ... [Complainant] was acting in the capacity as NVOCC ..." (CB, p. 38). If true, this further adds to the mystery of Complainant's inability to provide the booking numbers – or any contemporaneous shipping information – about these shipments. But insofar as these shipments are "Baltic Savannah" shipments, they are not Complainant's shipments, and therefore the claims are properly

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[4] ALJ: "Now, three and one-half years after filing and settling its 2011 D.N.J. Complaint, [Complainant] contends that ' ... the 2011 DNJ Complaint incorrectly made reference to there being 167 containers at issue in the lawsuit when there were actually 177 containers identified in the spreadsheet" (ID, p. 13) (citations to Complainant's pleading omitted).

[5] " ... the booking numbers were actually contained in the five hundred forty six (546) shipments in Attachment "'B'" ..." (CB, p. 36).

[6] Sometimes referred to as "Baltic Savannah" – *see* more, below, in the discussion of the Group V shipments.

dismissed on the same grounds as the Group V shipments (see below), *i.e.*, the shipments belong to entirely different entities.

If claims exist for the Group IV shipments (and if the shipments are actual shipments), they are in any event time-barred and were properly dismissed.

Group V Shipments

The claims and arguments with respect to the 21 Group V shipments are analyzed in extensive detail in the Initial Decision (ID, pp. 14-19). Of the 21 shipments, the contemporaneous shipping documents show "Baltic Savannah" to be the shipper of eight. The balance of thirteen shipments were of companies' completely unrelated to either Complainant or Baltic Savannah[7] (ID, pp. 18-19).

Essentially, the ALJ found that the idea that Complainant was the shipper was contradicted by the Complainant's own failure to allege that these were its shipments when it drafted and filed its FMC Complaint (and Amended Complaint) (ID, p. 18): " ... when it drafted its FMC Complaint, [Complainant], an NVOCC licensed by the Commission, did not consider itself to be the shipper of the Group V shipments and these shipments are beyond the scope of the FMC Complaint. The motion for reconsideration [that these were Complainant's shipments] is denied for that reason" (ID, p. 18).

[7] "Regarding the thirteen shipments for which an entity other than Baltic Savannah was identified as the shipper, Complainant ... cites no authority that would permit it to assert the claims of these unaffiliated entities" (ID, p. 19).

But the ALJ did not stop there with his analysis. He further found that "[e]ven if the motion [for reconsideration] were further considered, none of the shipping documents for the Group V shipments give any indication that complainant … was the shipper" and "[s]ignificantly, [Complainant] did not attach any contemporaneous documents establishing a connection between Complainant and the twenty-one shipments" (*Id.*).

The ALJ found that "there is no dispute that they [*i.e.*, Complainant and "Baltic Savannah"] are separate corporate entities. Each has its own rights and liabilities". (*Id.; see* discussion of the corporate status reports for Complainant – from Illinois; and for "Baltic Savannah" – from Georgia; ID, p. 15). Concluding that "Complainant … cites no authority that would permit Complainant to assert Baltic Savannah's right to assert a claim for injuries allegedly caused by [Respondent's] violations of the Shipping Act on Baltic Savannah's shipment because they have 'common ownership'" (*Id.*).

The corporate registration documents show that the named shippers of the Group V shipments are corporations separate and distinct from the Complainant. The Complainant states that these shipments were cargo it owned or for which it acted as an NVOCC[8] – yet can produce no documentation to support such claim. This is in the face of the FMC's rules on document retention for NVOCCs. While arguing that it was either the shipper for the shipments, or was an NVOCC with respect to "some"[9] of the shipments, Complainant never identifies the shipments

[8] "[Complainant] respectfully submits that the ALJ failed to take into account [Complainant's] role as an NVOCC with respect to the twenty one Savannah shipments. Specifically, although [Complainant] did not hold title to the automobiles within some of the twenty one shipments, [Complainant] was acting as an NVOCC for those shipments." (CB, p. 16).

[9] *See* Complainant's Exception IV, Attachment A to CB (p. 49); *see also* CB, pp. 3, 14, 16.

for which it was owner; or for which it was NVOCC. Its allegations therefore, are unsupported, and amount to speculation – unfounded with no contemporary supporting evidence.

In its Brief in support of its Exceptions, Claimant states that "the ID acknowledges the possibility of Baltic Chicago and Baltic Savannah having common ownership (ID at 18)" (CB, p. 24). This is incorrect. The ID states that "common ownership" of the entities is a mere "contention"[10].

Complainant now, for the first time in this proceeding, tries to use the Commission's discussion of "affiliate" on the Commission's website (*i.e.*, the "FAQ" page[11]) to make an argument, or at least raise an implication that Baltic Savanah was a "'shipper affiliate'" of Complainant (CB, pp. 24-25). Complainant states that since Baltic Savannah was a "shipper affiliate", its eight shipments must be deemed to be Complainant's. Complainant offers no facts, evidence, documentation or legal authority for this strained contention.

The Complainant claims it needed more "discovery" to prove that these twenty-one shipments were its shipments, and was "severely prejudiced" by not having more discovery (CB, p. 19). But how can that be? What could it "discover" when its own files (as either NVOCC or shipper) would surely prove its claim that with respect to such shipments it acted as NVOCC for

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[10] "Regarding the eight Baltic Savannah shipments and the contention that Complainant ... and Baltic Savannah have common ownership ..." (ID, p. 18).

[11] http://www.fmc.gov/questions/#408

"some", and was the owner of "some" others (*see* CB, p. 16)? The failure to produce credible contemporary evidence must be held against the Complainant.

In sum, the weight of the credible evidence contradicts the Complainant's positon; the non-contemporary evidence it offers is highly suspect; and the Census Bureau evidence of no relevance. (*See* ID at 17-18; fn. 8, p. 19).

Insofar as the Complainant alleges that the ALJ "ignored" evidence, it is quite clear that the non-contemporaneous evidence was considered – but found to be of little weight. Not ignored, rather weighed and found wanting[12].

Accordingly, the Group V shipment claims were rightly dismissed as not even being the Complainant's shipments.

Denial of request for shipping documents

Complainant takes exception to the Initial Decision claiming that "The ID is in error because it fails to address the respondents' [*sic*] continued failure to produce the house bills of lading, freight invoices, and other shipping documents for the shipments at issue … " (Exception VII, Attachment A to CB, pp. 49-50) (emphasis added)

Actually, the ALJ went to some length explaining that knowing since 2008 that the Respondent was not issuing such documents, the Complainant had "slept on its rights for more

[12] *See* discussion of Complainant's Presniakovas and Alla Kotova affidavits at ID, pp. 16-18.

than six years", which amounted to *laches* and a forfeiture of rights (ID, pp. 53-57; "slept on its rights" at p. 57). The ALJ observed: "Nearly four years after the end of its business relationship with [Complainant], an order to produce the documents would require [Respondent] to incur significant costs in time and money searching and producing records for shipments between four and eight years old" (Id, p. 57). The ALJ explained that its denial was an act of discretion: "While the Commission may have the *power* to enter an order requiring an NVOCC to provide records of shipments eight years old … the Commission is not required to issue the order" (ID, p. 56) (emphasis in the original).

That the request is frivolous is demonstrated by the fact that the Complainant has never explained the need for such documents, or the use to which they might be put.

In sum, the ALJ acted with prudence and appropriate discretion in refusing to sanction a useless activity and a waste of time – which would be at Respondent's considerable expense. The Complainant has made no showing that the ALJ has acted in an arbitrary or capricious manner. Accordingly, the refusal to order the production of useless, historical documents should be upheld.

No opportunity to brief *in camera* motion

The Complainant alleges that the April 1, 2015 Order Releasing Documents Submitted *In Camera* (Docket No. 30) was issued "*without giving [Complainant] the opportunity to brief the issue*" and "prejudiced [Complainant] in that [Complainant] did not have the opportunity to

provide documents and information it normally would have" (CB, p. 12 [emphasis in the original]; p. 13).

This is simply not true, as demonstrated by the action Complainant took after the issuance of the Order. Complainant filed a Motion for Reconsideration, and attached affidavits from two people (Docket No. 44). Complainant had ample opportunity to make its legal argument and to submit additional proof at that time – if it had any additional information.

The Complainant's claims of prejudice should be disregarded as not based on the facts of the case.

Attorneys' fees

It needs no citation to accept the proposition that if a party's opposed motion is granted, the moving party has prevailed.

In FMC practice, pursuant to the Coble Act, the party prevailing in connection with a claim for reparations may be awarded attorneys' fees.

The Initial Decision granted the Respondents the relief requested – dismissing the Complainant's Complaint for reparations. If the Initial Decision is not overturned by the Commission, the Respondents have "prevailed" and the award stands.

Conclusion

The Initial Decision should be adopted as the Commission's Final Decision, adopting the facts found, the analysis and conclusions of the ALJ.

Respectfully submitted,

Gerard S. Doyle, Jr.
THE LAW OFFICE OF DOYLE & DOYLE
636 Morris Turnpike
Short Hills, NJ 07078
973-467-4433 (Telephone)
973-467-1199 (Facsimile)
gdoyle@doylelaw.net
Attorneys for Respondents
Michael Hitrinov, a/k/a
Michael Khitrinov, and
Empire United Lines, Co., Inc.

Dated in Short Hills, NJ this day of 3rd of March, 2016.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the RESPONDENTS' MEMORANDUM IN REPLY TO COMPLAINANT'S EXCEPTIONS TO THE INITIAL DECISION ON RESPONDENTS' MOTION FOR PARTIAL SUMMARY DECISION upon Complainant's counsel, Marcus A. Nussbaum, Esq., with the address of P.O. Box 245599, Brooklyn, NY 11224 by first class mail, postage prepaid, by email (marcus.nussbaum@gmail.com); and that the original and five (5) copies are being filed with the Secretary of the Federal Maritime Commission.

Gerard S. Doyle, Jr.
THE LAW OFFICE OF DOYLE & DOYLE
636 Morris Turnpike
Short Hills, NJ 07078
973-467-4433 (Telephone)
973-467-1199 (Facsimile)
gdoyle@doylelaw.net
Attorneys for Respondents
Michael Hitrinov, a/k/a
Michael Khitrinov, and
Empire United Lines, Co., Inc.

Dated in Short Hills, NJ this 3rd day of March, 2016.